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Supreme Court,
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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1953

No. 645

SYRACUSE COLOR PRESS, INC.,
Petitioner,

—*v.*—

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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SYRACUSE COLOR PRESS, INC.,
Petitioner,

—*v.*—

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Syracuse Color Press, Inc., a New York State Corporation, prays that a writ of certiorari issue to review in the above entitled case the decree of the United States Court of Appeals for the Second Circuit, enforcing an order of the National Labor Relations Board, which decree was entered on February 8, 1954.

Opinions Below

The Trial Examiner's intermediate report (R. 14) is unreported. The Board's decision and order (R. 49) are reported at 103 N. L. R. B. No. 26. The opinion of the

Circuit Court of Appeals (R. 211) has not, as yet, been reported.

Jurisdiction

The decree of the Circuit Court of Appeals was entered on February 8, 1954 (R. 228). A petition for rehearing filed on January 20, 1954 (R. 219) was denied on February 2, 1954 (R. 227). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

Question Presented

Whether the mere interrogation of employees by an employer, regarding union membership and activities, standing naked and alone, and without any other violations, constitutes a violation of Section 8 (a) (1) of the National Labor Relations Act, when such interrogation has been specifically found by the Trial Examiner and affirmed by the Board, to be without coercive effect or hostility to organization or a part of a concerted plan to prevent or frustrate unionization.

Statute Involved

The pertinent statutory provisions are printed in Appendix A, infra, pg. 15.

Statement

Unfair labor practice charges were filed against Syracuse Color Press, Inc. alleging, among other things, that the petitioner, by its officers, agents and representatives, interrogated its employees regarding their union membership or activities. A hearing was held before an N. L. R.

B. Trial Examiner, and on June 5, 1952, the Trial Examiner handed down his intermediate report wherein he found the petitioner herein had violated Section 8 (a) (1) of the National Labor Relations Act, inasmuch as said employer had interrogated certain employees concerning their membership in and activities on behalf of a labor union.

The Trial Examiner clearly set forth the fact that the Board in the past had uniformly held that employer interrogation of employees concerning membership in a labor organization would be a violation *per se* of Section 8 (a) (1) of the Act and for such reason only said Trial Examiner felt constrained to again so hold. The Trial Examiner made it clear, in his opinion, that:

> "there is no evidence to warrant the conclusion that the questioning in this case had any coercive effect upon the employees or substantially interfered with their rights protected under the Act. Nor did the questioning occur in a background of company hostility to organization or as part of a concerted plan to prevent or frustrate unionization of its employees." (R. 36).

Upon review, the Board handed down its decision wherein it set forth that it adopted the findings, conclusions and recommendations of the Trial Examiner, with certain modifications, which modifications in no way affected the previous holding of the Trial Examiner regarding lack of coercion or hostility or plan to frustrate. Nonetheless, the Board set forth its opinion that there lies within this type of interrogation a basic vice in that "it is generally a prelude to acts of reprisal for union activities". Thus, although the Trial Examiner and the

Board found no coercion, the Board decided that such questioning might engender in the minds of employees a fear of reprisal, and on this possibility of fear, which the Board alone implied, held the interrogation violative of the Act.

The Court below, upon petition of the Board, decreed enforcement of the order of the Board directing petitioner to cease and desist from interrogating its employees and decreeing affirmative action (R. 56). The three Judge Court below affirmed the order with Chief Judge Chase dissenting. The Court below said "the circumstances * * * may go to make up '* * * at least the aroma of coercion' in which the interrogations were conducted."

The basis of the Board's holding was that interrogation by the employer concerning union activities violated the Act, *per se*. When the Board sought enforcement in the Court of Appeals for the Second Circuit of its order, it also sought an enforcement order in another case involving the same question of law, and the Board requested the Court to hear both cases at once, in the same argument, which request was granted. Such case was *N. L. R. B.* v. *Associated Dry Goods Corporation* (Lord & Taylor Division) formerly Lord & Taylor (CA—2, decided January 5, 1954, as yet unreported; see Appendix B). The *Associated Dry Goods* case involved the same question to be decided in each case, the employers having been absolved from all other unfair labor practice charges by the Board. The Court was composed of Chief Judge Chase, and Judge Clerk of the Court of Appeals for the Second Circuit, and Judge Stephen Brennen, District Judge for the Northern District of New York. In Petitioner's case, enforcement of the Board's order was decreed by Judges Clark and

Brennan with Judge Chase dissenting in a memorandum opinion; while in the *Associated Dry Goods* case Chief Judge Chase and Judge Brennen denied enforcement, with Judge Clark dissenting. The dissenting Judges in each case wrote opinions in which both of them stated that they could not understand any difference between the two cases, so that it affirmatively appears that the decisions are in conflict.

Specification of Errors to be Urged

The Court of Appeals for the Second Circuit erred:

1. In holding that interrogation alone violates the Act.

2. In finding that the circumstances may go to make up "at least the aroma of coercion" in which the interrogations were conducted, when the Trial Examiner found no evidence to warrant the conclusion that the questioning in this case had any coercive effect upon the employees, or substantially interfered with their rights protected under the Act, and did not occur in a background of company hostility to organization or as part of a concerted plan to prevent or frustrate unionization of its employees, and the Board adopted such findings.

3. In holding that petitioner preferred Book Binders Union rather than Mailers Union as an employee representative when the Trial Examiner found the opposite and the Board did not disturb the findings of the Trial Examiner.

4. In failing to follow and apply the principles of the rule laid down in Universal Camera Corporation v. N. L. R. B., 340 U. S. 474.

5. In failing to hold that the interrogation in this case was privileged under the Act and did not violate the Act.

6. In enforcing the order of the Board.

Reasons for Granting the Writ

1. The decision of the Court below in this case is directly in conflict with its decision in *N. L. R. B.* v. *Associated Dry Goods Corp.* (Lord & Taylor) (Appendix B pg. 18) decided by said Court on the same day, and also with its previous decisions in *N. L. R. B.* v. *Montgomery Ward & Company*, 192 F. 2D 160 and *N. L. R. B.* v. *Sandy Hill Iron and Brass Works*, 165 F 2D 660. This conflict was clearly demonstrated by Chief Judge Chase in his dissent in the Court below (R. 217) and we wish to incorporate the argument in his dissent as if it were sent forth at length herein. Other Circuit Court cases with which the instant case is in conflict are as follows:

1st Circuit:

N. L. R. B. v. England Bros., Inc., 201 F. 2D 395

Fourth Circuit:

N. L. R. B. v. *Hinde & Dauch Paper Co.*, 171 F. 2D 240

Sixth Circuit:

N. L. R. B. v. *Tenessee Coach Co.*, 191 F. 2D 546

Seventh Circuit:

John S. Barnes Corporation v. *N. L. R. B.*, 190 F. 2D 127

Sax d. b. a. Container Mfg. Co. v. *N. L. R. B.*, 171 F. 2D 769

N. L. R. B. v. *Arthur Winer Inc.*, 194 F. 2D 370 (Certiorari denied 344 U. S. 819).

Diamond T. Motor Coach Co. v. *N. L. R. B.*, 119 F. 2D 978.

The Act (Appendix A) affords free speech in labor matters by the provision that the act is not violated if the expressions contain no threat of reprisal or force or promise of benefit. All of the foregoing cases (excepting our case) recognize that questioning of employees must contain one of the foregoing prohibitions before there can be a violation of the act. The Board in our case has held that mere interrogation concerning Union Activities violates the act because the questioning itself might engender in the employee a fear of reprisal. They so held although "an impartial experienced examiner who observed the witnesses and lived with the case" (Mr. Justice Frankfurter in *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474) has found that the questioning had no coercive effect, and did not occur in a background of union hostility, or as a part of a plan to prevent unionization. As evidence of this possible fear of reprisal the Board in its decision and the Court below in its opinion cited testimony adduced by the Examiner himself (R. 65, 66) in support of its proposition of the fear that "might be engendered" when the Examiner himself found no coercive effect (R. 36) although he took the testimony over petitioner's objection (R. 65, 66). In other words, we have an expressed finding of no coercive effect which the Board affirmed without modification, but the Board to illustrate its possibility of a fear of reprisal cites evidence that the Trial Examiner rejected and did not believe (R. 65, 66) because he found no coercive effect (R. 36).

Section 10 (e) of the National Labor Relations Act (Appendix A) provides that the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. In the *Universal Camera Corp.* v. *N.*

L. R. B. case supra (340 U. S. 474), this Court held that the findings of the Examiner are to be considered along with the consistency and inherent probability of testimony and that the significance of his report of course, depends largely on the importance of the credibility in the particular case. Since the Trial Examiner, as stated above, found that the questioning had no coercive effect, the basis of the decision by the Board was a guess by the Board (to quote Chief Judge Chase in his dissent herein, R. 217) as to what may happen from the asking of a question and that guess is the evidence relied on to find the unfair labor practice to establish a violation of the Act.

2. The Court below also erred in finding that the circumstances may go to make up "at least the aroma of coercion" in which the interrogations were conducted when the Trial Examiner found and the Board affirmed that the questioning had no coercive effect, and did not occur in a background of Company hostility to organization or as part of a concerted plan to prevent or frustrate unionization of its employees, and the Board adopted such findings. This amounts to another violation of the Court below of Section 10 (e) of the Act and the doctrine of the *Universal Camera* case (340 U. S. 474).

The sole question to be decided by the Court below was "is mere interrogation of union activities violative of the National Labor Relations Act?" That was the sole questions left open by the Report of the Trial Examiner and the Decision of the Board. The Board's position is that interrogation alone violates the Act, not just because it is generally used as a prelude to acts of reprisal for union activities, but rather that its natural tendency (whether or not the employer intends in fact to engage in

such reprisals) is to implant in employee's minds fear of such reprisals. This was the contention of the Board in the instant case and also the *Associated Dry Goods* case (Appendix B) which it took to the Court of Appeals on the same day and requested permission to argue at the same time and as one case "because the sole issue in each case is the same" or words to that effect.

The *Associated* case and this case had to be decided the same way. In support of this, we cite Chief Judge Chase's dissent in this case (R. 216) and Judge Clark's dissent in the *Associated* case (Appendix B). The three Judge Court split in an interesting way. Judge Clark apparently agrees with the Board in its new theory of the fear that "might be engendered" from questioning concerning union activities. Chief Judge Chase in both cases adhered to the free speech provision of the Act and held since there was no present threat, or intimidation or promise of favor or benefit as a reward for resistence to the union, the questioning was not unlawful. Judge Brennan apparently did not agree with the rest of the Court that the cases had one single issue, and in our case made new findings of a preference for another union and an "aroma of coercion", which findings violated the Act, and the *Universal Camera* case rule, but which Judge Clark apparently went alone with because it reached the result that he agreed with.

Petitioner is, therefore, in the position of having been deprived of the "equal protection of the law" and has two Judges of a three Judge Court of Appeals to prove it by their written opinions, in two cases, argued together, containing one issue, and decided inconsistently by the same Court on the same day, which decision is also in conflict with decisions in five other Circuits.

3. The Court below in its attempt to find a means of enforcing this Order of the Board was forced to make a new finding of petitioner's preference for the Bookbinders Union when the Trial Examiner found that petitioner had no preference (R. 31, 32, 33) and the Board affirmed (R. 56). The Court was bound by such findings of no preference, which was not disturbed by the Board, and its finding to the contrary violated the Act and the doctrine of the *Universal Camera* Case (340 U. S. 474).

4. The interrogation in this case was privileged under Section 8 (c) of the Act as amended which permits the employer to express his views about unionization if unaccompanied by threats or coercion or promise of benefits. Perusal of the record will show that there was no anti-union hosility. Actually, the Board and the Court of Appeals in this case have held that free speech does not include questioning concerning union activities. It would preclude the asking a question even if the question were rhetorical. There was no finding by the Trial Examiner or the Board of coercion. The coercion relied on for the basis of the decision is that questioning concerning union activities implies coercion even though no coercion is intended. The coercion is in the asking of the question itself. This dangerous doctrine violates the Act and the free speech amendment of the United States Constitution. Proof that the questions are protected by the First Amendment to the Constitution is evident from the opinion of this Court in *Thomas* v. *Collins*, 323 U. S. 516, 537

> "Accordingly, decision here has recognized that employers' attempt to persuade to action with respect to joining or not joining unions are within the First Amendments guaranty. (Citing cases.) . . . When to this persuasion other things are added which bring

about coercion, or give it that character, the limit of the right has been surpassed. But short of that limit the employer's freedom cannot be impaired."

The decision of the Court below and the Board impairs the freedom of speech guaranteed by the First Amendment and Section 8 (c) of the Act because it makes statements which come from such guarantees evidence of an unfair labor practice when in fact *N. L. R. B.* vs. *Montgomery Ward & Co. Inc.*, (CA 2) 192 Fed. 2d 160, holds that such questions are privileged under the 1947 Amendment of the Act which is found in Section 8 (c). The *Montgomery Ward* case was in accord with the other cases cited in (1) above and the instant case is in conflict with it and such other cases and this conflict should be resolved by this Court.

5. Certiorari should also be granted because the question here involved is nationwide in scope, and clarification and a resolve of the conflict between the decisions of the various Circuits should be made by this Court. The impact of the holding in the instant case and the questions that it has created, not only in the minds of Labor Law lawyers advising employers, but also in the Board itself, is demonstrated by the reports of the Trial Examiner and the decisions of the Board in *Milwaukee* v. *Nash Company* (1953) 105 N. L. R. B. (No. 106) and *Protein Blenders Inc.* (1953) 105 N. L. R. B. (No. 137).

The instant case was argued before the Circuit Court on November 4, 1953 and decided on January 5, 1954. On December 17, 1953 the National Labor Relations Board handed down its decision in *Livingston Shirt Corporation*, 107 N. L. R. B. 109 and held as follows:

"Regarding interrogation by supervisors, the en-

> tire record discloses but two isolated instances of such conduct. As we find hereafter that the respondent Livingston has engaged in no violation of the Act, neither a remand nor a remedial order is justified on these isolated interrogations."

From this decision it is apparent that the Board has abandoned its position that questioning of union activities engenders in the minds of employees a fear of reprisal and therefor violates the Act. The instant case was recognized by the Board as involving the sole question of whether mere interrogation of employees of union activities carried with it a threat of reprisal. The Board, by its affirmance of the Trial Examiners report, found that there was no coercive effect in the instant case yet the Board held questioning alone violated the Act on its claim of a fear of reprisal, which claim was wholly unwarranted on the record. Labor Lawyers reading this decision in the light of the decisions under (1) above and the *Livingston Shirt Corporation* case, 107 N. L. R. B. (No. 109) will be unable to properly advise their clients as to what protection Section 8 (c) affords employers in the discussion of union activities. The Act permits an expression of views on the part of the employer but if the employer is prevented from having a full, free discussion by being prohibited from asking questions concerning union activities, how can an employer freely express its views. Free speech certainly must carry with it the right to ask questions under the statute if there is no threat of reprisal or force or promise of benefit. Certainly the asking of the question itself should not be allowed to be evidence of the threat. The instant case has this sole issue and this Court, by granting certiorari, can resolve the conflict in the decisions of the various Circuits and remove the nationwide

confusion that has arisen since the decision of the Board in this case as to the right of an employer to interrogate its employees.

Further evidence that certiorari should be granted in this case to remove the existing confusion in the minds of labor lawyers as well as the Trial Examiners and the Board itself is proved in the *Milwaukee Nash Company* (1953) 105 N. L. R. B. (No. 106) cited above where the Trial Examiner reported that acts of interrogation standing unsupported by any other unfair labor practices were not per se violations of the Act and so concluded, relying on the fact that this Court denied certiorari in *N. L. R. B.* v. *Arthur Winer Inc.*, 194 F. 2d 370, certiorari denied 344 U. S. 819. The *Winer* case held that in the absence of an actual threat of economic loss or promise of benefit or background of other unfair labor practices evidencing hostility towards employees' lawful attempts at self organization, mere acts of interrogation by an employer do not constitute unlawful interrogation within the meaning of Section 8 (a) (1) of the Act. The Board disagreed with the Trial Examiner regarding the general effect of this Court's denial of certiorari in the *Winer* case and also pointed out that it had reached precisely the opposite conclusion from that reached in the *Winer* case in its more recent expression on this issue in *N. L. R. B.* v. *Syracuse Color Press Inc.*, 103 N. L. R. B. (No. 26). The Board has, therefore, added to the confusion by claiming that regardless of the fact that this Court has denied certiorari in the *Winer* case, the instant case is their latest pronouncement of the per se doctrine and their leading authority for holding interrogation per se violates the Act. Since the Board has been upheld by the Court of Appeals

for the Second Circuit, certiorari should be granted to remove the confusion.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES P. BURNS, JR.
Counsel for Petitioner.

Dated: March 15, 1954.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Sec. 151, et seq.), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) it shall be an unfair labor practice for an employer—

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expressions contains no threat of reprisal or force or promise of benefit.

* * * * * *

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any

unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

* * * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effecuate the policies of this Act: * * *

* * * * * *

Sec. 10. (e) The Board shall have power to petition any Circuit Court of Appeals of the United States * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has been urged before

the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 41—October Term, 1953.
(Argued November 4, 1953 Decided January 5, 1954.)
Docket No. 22745

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

ASSOCIATED DRY GOODS CORPORATION (Lord & Taylor Division) formerly LORD & TAYLOR,
Respondent.

Before:

CHASE, *Chief Judge,*
CLARK, *Circuit Judge,* and BRENNAN, *District Judge.*

Petition for Enforcement of an Order of the National Labor Relations Board. Enforcement Denied.

GEORGE J. BOTT, General Counsel; David P. Findling, Associate General Counsel; A. Norman Somers, Assistant General Counsel; Arnold Ordman, David J. Vann, Attorneys, *for Petitioner, National Labor Relations Board, Washington, D. C.*

GOULD & WILKIE, New York City, *Attorneys for Respondent;* Morrell S. Lockhart, Vincent F. O'Hara, of Counsel.

BRENNAN, *District Judge.*

The National Labor Relations Board seeks the enforcement of its order of March 4, 1953, in accordance with the provisions of the National Labor Relations Act, hereinafter referred to as the Act.

The order is based upon findings which led to the conclusion that respondent had violated Section 8 (a) (1) of the Act (29 U. S. C. 158 (a) (1)), in that respondent threatened its employees with loss of benefits in the event that its store became unionized, and by the coercive nature of the interrogation of employee Wiszuk. The factual background will be concisely stated.

From May, 1951, continuing throughout the balance of the year, the United Department Store Workers of America, C. I. O., hereinafter referred to as the Union, were engaged in an effort to organize the employees of respondent, then known as "Lord & Taylor."

In September, 1951, shortly after Labor Day, a Mr. Strohldreier, a service manager of respondent, talked with employee Weiner, as follows:

> "Q. Will you give us all the conversation that took place between you and Mr. Strohldreier at that time? A. We got into a discussion about unions, and he stated that he worked in Macy's and that they had a union there and he believed that if we did have a union here the spirit of Lord & Taylor would not be there, and that most likely if we did have a union we might lose some of the benefits we had now in the store.
>
> Q. Did he specify any benefits you might lose? A. He said they might put in a time clock."

In June, 1951, in the course of the campaign, a leaflet was distributed throughout the store, which bore the signature of a salesman employee of respondent, named Wiszuk, as one of the employee organizers. In the same month Wiszuk was asked by a Mr. Carroll, a buyer: "He wanted to know my views and why I wanted a union. That was the discussion." The record shows no reply and no further discussion. Buyer Wallace Smith in the same month inquired of Wiszuk in Mr. Smith's office, as follows: "To the best of my recollection, he asked me about union activities, why I was interested in the union, what I would personally gain out of belonging to a union. And I again told him what I believed so far as the benefits of security and what we did not have at that time." The quotation ended the conversation. In August, 1951, Miss Donnelly, Director of the Training Department, conversed with Wiszuk as follows: "She asked me why I wanted a union at Lord & Taylor, why I was for it, and again what benefits I would derive from having a union there, and I explained what I believed in and told her * * *." "I explained that I would have a certain amount of security with a union, where working under the conditions they have I would not have it; also I would gain other benefits that were not given us by the concern." The conversation took place in Miss Donnelly's office, and she suggested that Wiszuk make an appointment with a vice-president of respondent who would be able to give him additional information so far as benefits that the store gave the employees were concerned. Sometime after Labor Day, 1951, Mr. Hamlet, an assistant operating manager, conversed with Wiszuk as follows: "He asked why I was in favor of a union, what benefits I would gain in having a union at Lord & Taylor." "I gave him my answers why a union

would help me and other employees in the store." The conversation took place in Mr. Hamlet's office.

So far as material here, the findings and conclusions of the Board upon which the order was based must find their support in the occurrences outlined above. There is no finding of anti-union hostility to afford support for the findings of the Board. In fact, union organizers were allowed free access to the public areas of the store during the organization campaign. Wiszuk was granted two increases in compensation during the campaign; one, as part of a general wage increase, and the other upon his specific request. The problem here is to evaluate the above occurrences in the light of the provisions of the Act. Section 7 insures to employees the free right of self-organization, while Section 8 (c) provides that the expressing of any views, argument or opinion shall not constitute or be evidence of an unfair labor practice, if such expression contains no threat of reprisal or force or promise of benefit.

The Trial Examiner ruled that Stohldreier's discussion with Weiner did not constitute an unfair labor practice. The Board found otherwise, in that the discussion constituted a threat of loss of benefits to the employees. We find no substantial evidence to support such finding. The conversation appeared to be casual. It was a statement of the speaker's experience, opinion and prophecy, as distinguished from a statement of fact.

As to the interrogation of Wiszuk, both the Trial Examiner and the Board failed to find direct threats, coercion or promises therein. They appear to base their decisions upon the reasoning of *Standard-Coosa-Thatcher Co.*, 85 N. L. R. B. 1358, to the effect that interrogation alone as

to union activities or union membership implies coercion. Here was an employee actively engaged in union organization. His status, insofar as the Union is concerned, was public knowledge. No inquiry was made as to the extent of union membership, its organization, its plan of campaign, its meetings or its meeting place. The inquiry was entirely a natural one, and four such inquiries over a period of seven months is insufficient from which to infer a plan or intention to coerce.

It is also to be noted that the conversations involved no argument. Wiszuk's explanations apparently met with no opposition. Unless we are to ignore the provisions of the Act above referred to, which insures to the employer the right of free speech, provided same contains no threat of reprisal or force or promise of benefit, then it seems clear that there is no substantial evidence to support the findings of the Board.

We can find no judicial precedent which goes as far as the petitioner requests in this case. In this Circuit the case of *N. L. R. B.* v. *Montgomery-Ward*, 192 F. 2nd 160, holds in effect that an employer may make inquiry of employees during the organization campaign, provided such inquiry and subsequent discussion contains no threat or promises. We adhere to that decision, which is supported by the opinions in *Wayside Press* v. *N. L. R. B.*, 206 F. 2nd 862; *N. L. R. B.* v. *England Bros.*, 201 F. 2nd 395; *N. L. R. B.* v. *Arthur Winer, Inc.*, 194 F. 2nd 370, and cases cited therein.

In *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, the duty of the court in this enforcement proceeding is defined. Following the rules expressed therein it is suffi-

cient to say that the evidence as a whole lacks the required substance to afford a basis for the order of the Board, and the petition to enforce is denied.

CLARK, *Circuit Judge* (dissenting):

In *N. L. R. B.* v. *Syracuse Color Press, Inc.*, decided herewith we have upheld the Board in finding coercion in the pointed cross-examination of five employees as to union organizing activities within the plant. It seems to me the present case, involving persistent questioning along the same line of a single key employee, comes within essentially the same rationale. For my part I do not see a distinction *of law* between "the aroma of coercion" affecting one union member over a period of some months and that affecting several employees substantially all at one time. In either case there would seem to be a sound basis in the evidence from which the Board could and should draw such conclusions as in the light of its experience and responsibility it felt the circumstances to require. I would grant enforcement of the order.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 645

SYRACUSE COLOR PRESS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 211-218) is reported at 209 F. 2d 596. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 14-41, 49-57) are reported at 103 NLRB No. 26.

JURISDICTION

The decree of the court below was entered on February 8, 1954 (R. 228-230). The petition for a writ of certiorari was filed on March 17, 1954.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether substantial evidence on the record considered as a whole supports the Board's finding, approved by the court below, that petitioner in violation of Section 8(a)(1) of the Act interfered with, restrained, and coerced its employees by systematically interrogating five key employees, on the eve of a Board election, concerning their membership in a union, their attendance at its meetings, and the membership and attendance at union meetings of their fellow employees.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Petition, pp. 15-17.

STATEMENT

I. The Board's findings of fact

The Board found that petitioner had interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act by interrogating them concerning their union membership, their attendance at union meetings, the location of union meetings, and the outcome of a pending representation election. The subsidiary facts upon which these findings rest may be summarized as follows:

A. *Background*

Prior to the fall of 1950 petitioner's employees were unorganized. Petitioner, however, had an agreement with the Allied Trades Council granting petitioner the privilege of using a union label, which petitioner used on some of its products (R. 50, 26; 192-193, 186-187).[1] This privilege was subject to termination by any of the five members of the Council (R. 26; 187).[2]

In the fall of 1950, International Mailers Union, unaffiliated (hereinafter referred to as Mailers Union), began to organize petitioner's employees (R. 17; 140). The Mailers Union was not a member of the Allied Trades Council (R. 50; 199-200). At about the same time International Brotherhood of Bookbinders, AFL (hereinafter referred to as Bookbinders Union), which was a member of the Council, also commenced organizational activities in petitioner's plant (R. 17; 143-145, 174). Thereafter Mailers Union filed a petition for certification as the bargaining representative of petitioner's employees (R. 17). On March 9, 1951, the Board directed that an election be conducted on March 31 in the production and maintenance unit of petitioner's establishment (R. 50, 17).

About 2 weeks before the election the employees

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[1] Whenever, in a series of references, a semicolon appears, the references preceding it are to the Board's findings; those following are to the supporting evidence.

[2] The Council is composed of the International Typographical Union, International Pressmen and Assistants' Union, International Photoengravers Union, International Stereotypers and Electrotypers Union, and the International Brotherhood of Bookbinders (R. 21, n. 6; 138, 198).

engaged in numerous discussions as to whether petitioner would lose the use of the union label, and thereby also lose business, if Mailers Union won the election (R. 26; 185). Some employees sought information in this regard from Plant Superintendent McGarry (R. 20, 26; 177, 191-192, 143, 198), who had been a member of Bookbinders Union from 1939 to 1950. McGarry reported these incidents to Company officials who subsequently instructed him to call the employees in and explain the label to them (R. 26; 192-193).

Accordingly, about one week before the election, Superintendent McGarry called five of petitioner's 40-odd employees, Carl Anthony, Edward Yagelski, Matthew Wierzbicki, Henry Maholick, and Frank Sarna, into the office to meet with him and General Manager Benedict (R. 26; 193). Anthony, Yagelski, and Sarna were interviewed individually; the other two were interviewed together (R. 50-51; 196). McGarry testified that petitioner selected these "key" people for interview "knowing they would repeat what we said to the balance of the plant" (R. 193-194).

B. *The interrogations*

Anthony, a shipping clerk, was the first employee called into the plant office (R. 60, 64). General Manager Benedict and Superintendent McGarry discussed with Anthony the Trades Council label and its business advantages, pointing out that if the Mailers Union was selected petitioner might lose its use of the label and consequently suffer a loss of business (R. 21; 198-199, 64). Late in the conver-

sation McGarry asked Anthony if he belonged to the Mailers Union, if he had attended any of its meetings, if he knew of anyone attending such meetings, and where the meetings were held (R. 22, 51; 64). Although Anthony was in fact a member of Mailers Union and had attended its meetings, he denied those facts when McGarry questioned him (R. 52, 22; 60, 65). At the hearing, explaining why he had not disclosed his membership in Mailers Union, Anthony stated that if he had, he "would be put on the spot" (R. 52, 66). At the conclusion of this 10 to 15 minute meeting, McGarry stated that he was going to talk to three or four other employees that morning and asked Anthony to have Yagelski come in (R. 22; 65, 68).

Yagelski, who was employed as a cutter, was, like Anthony, a member of Mailers Union (R. 102, 107). When he arrived at the office, McGarry and Benedict explained to him the significance of the union label (R. 22-23; 99-100). During the conversation Yagelski was asked "if the fellows attended the meetings" of Mailers Union and if he "attended the meetings of the Mailers Union" (R. 23, 51-52; 100-101). Yagelski replied that he had attended meetings of Mailers Union "a few times" (R. 23; 100).

Matthew Wierzbicki and Henry Maholick were called into the office together (R. 23; 85, 108, 196). At the outset of the conversation, Superintendent McGarry asked Wierzbicki "Are you a member of Mailers?" (R. 23; 86). Wierzbicki replied that he was not although he was in fact an active member

(R. 23; 51, 86). McGarry then discussed the possibility that if the Mailers Union prevailed the Allied Trades Council might take away the label with the result that petitioner might "have to close the place down" (R. 23; 86). McGarry also inquired of Wierzbicki as to "what [the employees] talked about" in reference to the two competing unions, but Wierzbicki made a non-committal reply (R. 24; 86-87).

Maholick testified that during the interview McGarry and Benedict not only discussed the possible loss of the Council label if the Mailers Union won, but also discussed how many of the employees were members of Mailers Union (R. 24, 51; 108-109). Either Plant Manager Benedict or McGarry asked Maholick if he "was a Mailer" (R. 24; 108).

Superintendent McGarry commenced the interview with Sarna by saying that Sarna was not being called in for the purpose of eliciting information concerning his membership or nonmembership in any union but simply to explain that if the Mailers Union became the bargaining representative petitioner might lose the right to use the label, which would mean that "work might slacken down" and the employees "might be laid off" (R. 24; 93). However, during the interview McGarry or Benedict asked Sarna whether he "had an opinion about what [he] thought about the election", and Sarna replied that he had no opinion (R. 24, 51-52; 93-94).

On March 31, 1951, the Board-directed election was held and Mailers Union, the only participating union, lost by a vote of 22 to 21 (R. 17, 50).

II. The Board's conclusions and order

Upon the foregoing facts and the entire record, the Board, agreeing with the Trial Examiner, concluded that petitioner, in violation of Section 8 (a)(1) of the Act, had interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act. In reaching this conclusion the Board relied specifically upon the following interrogation by petitioner's general manager and plant superintendent: (a) questioning employees Anthony, Maholick and Wierzbicki about their membership in Mailers Union, (b) asking employee Yagelski if he attended meetings of Mailers Union, (c) asking employee Anthony if he attended such meetings and where they were held, and (d) asking employee Sarna for his opinion about the outcome of the pending election.

The Board's order (R. 55-57) requires petitioner to cease and desist from the unfair labor practices found and to post appropriate notices.

III. The decision of the court below

The court below, Chief Judge Chase dissenting, noted that "of necessity, interference, restraint, or coercion depend upon the facts of each individual case" (R. 214), and sustained the findings, conclusions, and order of the Board. The court, distinguishing on their facts the cases relied upon by petitioner, observed (R. 215) that in this case—

> The interrogations were conducted by highly placed officials of respondent, as distinguished

> from minor supervisory officials. It was part of a plan of explanation as distinguished from casual inquiry. It took place in the office of authority, as distinguished from the regular place of activities of the employees. Attendance by the employees was compulsory rather than voluntary or optional. It involved inquiries as to union membership of the employee and fellow employees, attendance at union meetings of the employee and other employees and the location of the meeting place. It sought information of union strength and the names of employees who were members. The interrogations involved only the disfavored union, and were conducted with the knowledge and intention that their substance would be communicated to other employees.

Finally, noting that one of the employees felt constrained to conceal by falsification the fact of his union membership, the court below concluded (R. 216) that "all of the circumstances above referred to may go to make up '* * * at least the aroma of coercion'[3] in which the interrogations were conducted."

The dissenting judge was of the view that in the absence of evidence that the questioning had a coercive effect or that it occurred in a context of employer hostility to union organization, the Board could not infer "that such questioning might engender in the minds of employees a fear of reprisal" (R. 217).

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[3] Quoting *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 740 (C.A. D.C.), certiorari denied, 341 U.S. 914.

ARGUMENT

Subsequent to the filing of the present petition, this Court denied certiorari on a substantially identical question. *United Biscuit Co.* v. *National Labor Relations Board,* 208 F. 2d 52 (C.A. 8), certiorari denied April 5, 1954, No. 575, this Term. For the reasons stated in our brief in opposition in the *United Biscuit* case, and for the additional reasons outlined below, we submit that certiorari should likewise be denied here.

As we noted in opposing certiorari in *United Biscuit,* all the courts of appeals have recognized that when an employer's interrogation of his employees concerning their union activities passes the limits of non-coercive, casual and isolated inquiry it violates Section 8(a)(1) of the Act. Brief in Opposition, No. 575, this Term, pp. 8-9, n. 3. The decisions which petitioner claims are in conflict with that of the court below, including the decision of the court below in *National Labor Relations Board* v. *Associated Dry Goods Corp.,* 209 F. 2d 593, on which petitioner places primary reliance, reflect no difference in principle but solely a determination that on the records there presented the interrogation was casual, isolated, and perfunctory. In the instant case, as the court below observed (*supra,* pp. 7-8), the facts establish that the interrogation was carefully planned, systematic, and intentionally pervasive of the entire working force; hence, there is no conflict of decisions requiring resolution by this Court.

Contrary to petitioner's contention, the decision below is not vulnerable because the record may not

contain direct proof (1) that petitioner was prompted in interrogating the employees by a purpose to interfere with or restrain them in the exercise of their rights under the Act or (2) that the interrogation actually had a coercive effect. It has been uniformly recognized that "the test of interference, restraint and coercion under § 8(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. * * * The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7). See also *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 805; *cf. Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 42-46, 50-51. Moreover, as the court below observed, the instant record contains "actual proof that the interrogation did, in fact, impart a fear that a truthful answer would be a matter of embarrassment" (R. 216).

Finally, petitioner errs in its reliance upon Section 8(c). For, as the courts have repeatedly held, interrogation of the kind the Board and the court below found in this case, carrying at least an implied threat of reprisal, is not within the protection Section 8(c) recognizes for an employer's expression of "views, argument, or opinion" containing "no threat of reprisal or force or promise of benefit." *National Labor Relations Board* v. *Minnesota Mining & Mfg. Co.*, 179 F. 2d 323, 326 (C.A. 8);

National Labor Relations Board v. *Kropp Forge Co.*, 178 F. 2d 822, 827-828 (C.A. 7), certiorari denied, 340 U. S. 810; *National Labor Relations Board* v. *LaSalle Steel Co.*, 178 F. 2d 829, 835 (C.A. 7), certiorari denied, 339 U. S. 963; *National Labor Relations Board* v. *Gate City Cotton Mills*, 167 F. 2d 647, 649 (C.A. 5).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1954.

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